IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 427

INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), An Unincorporated Labor Organization, and MICHAEL YOLK, An Individual,

Petitioners,

vs.

PAUL S. RUSSELL,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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INDEX TO APPENDIX

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

APPENDIX A

Part A

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Art. I, Sec. 8, Clauses (3) and (18):
Art. VI, Clause (2):

"Art. I, Sec. 8. (Powers of Congress). The Congress shall

"(3). To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

* * * * *

"(18). To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

"Art. VI. Clause 2. Supreme Law.—

"(2). This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Part B

STATUTES INVOLVED

LABOR MANAGEMENT RELATIONS ACT, 1947, and NATIONAL LABOR RELATIONS ACT, AS AMENDED

61 Stat. 140 ff, 29 U. S. C.

Section 141 (b), Section 157, Section 158 (b) (1) and (2), Section 160 (a), and (c), Section 163, Section 185 (a), Section 187 (b):

"Sec. 141 (b). * * *

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

"Sec. 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives

of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 88 (a) (3)."

"Sec. 158 (b). It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

"Sec. 160:

"(a) The Board is empowered, as hereinafter provided to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has

been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Terriorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * *

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the poliices of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a com-

(1) or section 8 (a) (2), and in deciding such ca
the same regulations and rules of decision shall ap
irrespective of whether or not the labor organizat
affected is affiliated with a labor organization natio
or international in scope. Such order may furt
require such person to make reports from time to t
showing the extent to which it has complied with
order. If upon the preponderance of the testim
taken the Board shall not be of the opinion that
person named in the complaint has engaged in or
engaging in any such unfair labor practice, then
Board shall state its findings of fact and shall iss
an order dismissing the said complaint. No order
the Board shall require the reinstatement of any
dividual as an employee who has been suspended
discharged, or the payment to him of any back pa
if such individual was suspended or discharged
cause. In case the evidence is presented before a me
ber of the Board, or before an examiner or examin
thereof, such member, or such examiner or examine
as the case may be, shall issue and cause to be serv
on the parties to the proceeding a proposed report,
gether with a recommended order, which shall be fi
with the Board, and if no exceptions are filed wit
twenty days after service thereof upon such parti
or within such further period as the Board may
thorize, such recommended order shall become
order of the Board and become effective as there
prescribed.

* * * * *

"Sec. 163. Nothing in this Act, except as specifica
provided for herein, shall be construed so as eit
to interfere with or impede or diminish in any w

the right to strike, or to affect the limitations or qualifications on that right."

* * * * *

"Sec. 185 (a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

"Sec. 187 (b). Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

APPENDIX B

Part A

OPINION AND JUDGMENT OF SUPREME COURT OF ALABAMA

Entered March 22, 1956

(R. 693-708)

Livingston, Chief Justice.

This is the second appeal in this cause. Paul S. Russell brought suit against International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., an unincorporated organization, and other unions, later stricken by amendment, and Michael Volk and other individuals, who were also stricken by amendment. Michael Volk is a resident of the State of Alabama and a member of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., an unincorporated organization. The defendants filed a plea to the jurisdiction, to which the plaintiff demurred. The court overruled the demurrer to the plea and because of this adverse ruling, the plaintiff took a nonsuit and appeal on the record, as authorized by Sec. 819, Tit. 7, Code 1940. On that appeal, this court held that the Circuit Court of Morgan County, Alabama, did have jurisdiction of the cause of action stated in the complaint and reversed and remanded the cause to the Circuit Court of Morgan County. *Russell v. International Union, Automobile, Aircraft & Agricultural Implement Workers of America, C. I. O., et al.*, 258 Ala. 615, 64 So. 2d 384.

After the cause was remanded to the circuit court, that court set aside its judgment of nonsuit and reinstated the cause on the trial docket. Thereafter, some amendments were made to the complaint, and the complaint as last amended contained two counts which were substantially the same as the counts before this court on former appeal. The plea to the jurisdiction of the court was refiled and demurrers thereto were sustained by the trial court. Demurrers to each count of the complaint being overruled, defendants entered a plea of the general issue in short by consent with leave, etc. The case was then tried to a jury and resulted in a verdict for the plaintiff for $10,000, and the defendants bring this appeal.

The question of jurisdiction is again raised and argued. Since our decision on former appeal, the Supreme Court of Virginia rendered its decision in the case of *United Construction Workers v. Laburnum Construction Corp.*, 194 Va. 872, 75 S. E. 694. The Virginia Court there said:

> "It is settled by recent decisions of the Supreme Court of the United States that by the passage of the National Labor Relations Act of 1935, 49 Stat. 449, 29 U. S. C. A. §151 et seq. as amended by the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. A. §141 et seq., Congress has occupied and closed to the States the field of 'regulation of peaceful strikes for higher wages' in industries engaged in interstate commerce. International Union, etc. v. O'Brien, 339 U. S. 454, 457, 70 S. Ct. 781, 783, 94 L. Ed. 978; Amalgamated Ass'n, etc. v. Wisconsin Employment Rel. Bd., 340 U. S. 383, 390, 71 S. Ct. 359, 363, 95 L. Ed. 364.
>
> "But this is not to say that by the passage of the Act the courts of the several States have been deprived of their traditional power and jurisdiction to deal with unlawful conduct committed within their

respective territorial limits during the course of a labor dispute which may affect interstate commerce. The Supreme Court has repeatedly held that an 'intention of Congress to exclude states from exerting their police power must be clearly manifested.' Allen-Bradley Local, etc. v. Wisconsin Employment Rel. Bd., 315 U. S. 740, 749, 62 S. Ct. 820, 825, 86 L. Ed. 1154, and cases there cited. As was said in Kelly v. State of Washington, 302 U. S. 1, 10, 58 S. Ct. 87, 98, 82 L. Ed. 3, '* * * the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot be "reconciled or consistently stand together." '

"In Erwin Mills, Inc. v. Textile Workers Union of America, 234 N. C. 321, 67 S. E. 2d 372, it was held that the federal Act did not deprive the State court of the power by appropriate action to protect persons and property from threatened unlawful acts of violence committed during the course of a strike or labor dispute and injurious to the rights of the State's citizens. To the same effect are, Williams v. Cedartown Textiles, 208 Ga. 659, 68 S. E. 2d 705; International Moulders, etc. v. Texas Foundries, Tex. Civ. App. 241 S. W. 2d 213; State ex rel. Allai v. Thatch, 361 Mo. 190, 234 S. W. 2d 1; Rice and Holman v. United Elec. Radio & Mach. Workers, 3 N. J. Super. 258, 65 A. 2d 638.

"The determination of the present question is governed by the same principles. While the Act provides a remedy to restrain the commission of acts constituting unfair labor practices, there are no words which indicate that such remedy is exclusive, or that the Act was designed to deprive an *employer or his employees* of the common-law right of action in a State court for acts of violence or intimidation which may constitute unfair labor practices. Nor does the exercise by the State of its jrisdiction in enforcing such cause of action conflict with any of

the provisions of the Act, or in way impinge upon the rights thereby protected. (Emphasis supplied.)

"Upon substantially this reasoning the Supreme Court of Alabama in Russell v. International Union, Ala. Sup. 64 So. 2d 384, decided March 13, 1953, upheld the right of the State court to entertain an action for damages against a labor union for malicious acts of violence and threats of personal injury by the union's agents which prevented 'plaintiff from engaging in his employment,' although such conduct on the part of the union's agents constituted an unfair labor practice under the federal Act.

"The motion to dismiss was properly overruled."

The Supreme Court of the United States in reviewing the *Laburnum* case, *supra*, said:

> "The question before us is whether the Labor Management Relations Act, 1947, has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act. For the reasons hereafter stated, we hold that it has not." 347 U. S. 656.

These recent cases but fortify our decision on former appeal. The argument that there is a distinction between the *Laburnum* case and the instant case, in that the employer was the plaintiff in the one, and an employee is the plaintiff in the other, is clearly without merit.

The legal sufficiency of each of the two counts of the complaint which were submitted to the jury is assailed on this appeal. As stated above, the complaint was amended after the cause was remanded to the trial court by this court. We have indicated that the amendments worked

no material change in either of the two counts, but for p
fect clarity Count One of the complaint, as it reads giv
effect to all amendments to it, will be set out in the rep
of the case. Count 2 is similar to Count One, except tha
alleges a conspiracy among the defendants in connect
with the same matters alleged in Count One.

In briefs, both appellants and appellee devote m
time and space to the question as to whether the compla
states a cause of action for false imprisonment; also, as
whether it states a cause of action as for a nuisance
blocking a public street. But we lay these arguments asi
We think the complaint states a cause of action for unla
fully and maliciously preventing plaintiff from engag
in his employment. We also think that the evidence w
sufficient to take the case to the jury on both counts
the complaint.

Two principal theories are advanced as to why the co
plaint does not state a cause of action for unlawfully a
maliciously preventing plaintiff from engaging in his e
ployment. First, that the complaint does not sufficien
allege that plaintiff lost wages as a result of the unlaw
picketing. In other words, that it is not alleged that w
would have been available to plaintiff at the plant had
been able to enter it during the period of time complai
of. Second, that the names of the agents through whom
union acted are not shown, and that Count 2 is vague a
indefinite.

We need not cite authority to the effect that peace
picketing for a lawful purpose and in a lawful manner
lawful. We judicially know that, ordinarily, union e
ployees will not cross a picket line. It is equally t
that union or nonunion employees may lawfully cross
picket line if they desire to do so. But here, these m

ters are unimportant. The gravamen of the complaint is that defendants unlawfully and maliciously prevented plaintiff from engaging in his employment by unlawful means.

This court recognizes that the right to pursue a lawful occupation is a property right, and the wrongful interference therewith is an actionable wrong. *Sparks v. McCrary,* 156 Ala. 382, 47 So. 332; *Hardie-Tynes Mfg. Co. v. Cruse,* 189 Ala. 66, 66 So. 657; *U. S. Fidelity and Guaranty Co. v. Millonas,* 206 Ala. 147, 89 So. 732; *Bowen v. Morris,* 219 Ala. 689, 123 So. 222; *Hill Grocery Co. v. Carroll,* 223 Ala. 376, 136 So. 789; *Carter v. Knapp Motor Co.,* 243 Ala. 600, 11 So. 2d 383; *Russell v. International Union, etc., supra; Lash v. State,* 244 Ala. 48, 14 So. 2d 229; *Alabama State Federation of Labor v. McAdory,* 246 Ala. 1, 18 So. 2d 810.

Sparks v. McCrary, supra, was an action in which plaintiff alleged that defendant wrongfully prevented plaintiff from carrying on his retail business. In reversing a judgment sustaining a demurrer to the complaint, this court said:

> "In necessary consequence, an unlawful invasion of or interference with the pursuit or progress of one's trade, profession, or business is a wrong for which an action lies. Holt, C. J., in Keeble v. Hickeringill, 11 East, 574, thus states the doctrine: 'He that hinders another in his trade or livelihood is liable to an action for so hindering him'—though it must be that he intended the broad declaration to be subject to the qualification that the hindrance, the act or conduct so resulting, be wrongful, unlawful, and this, independent, as a general rule, of the motive or intent with which the hindrance was accomplished."

Employees may strike and may picket their employer's place of business when it is done in a lawful manner and to accomplish a lawful purpose. *Hotel and Restaurant Employees v. Greenwood,* 249 Ala. 265, 30 So. 2d 696; *Alabama State Federation of Labor v. McAdory, supra; Thornhill v. Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093. Picketing must be conducted in a lawful manner and it becomes unlawful when force and violence or the threat of force and violence are used to intimidate employees who are not engaging in the strike. *Hardie-Tynes Mfg. Co. v. Cruse, supra; Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836. The use of force and violence or the threat of force and violence against one's person is manifestly unlawful. Furthermore, the Alabama statutes make it unlawful for one to use force, threats or intimidation to prevent another from engaging in a lawful occupation. Tit. 14, Sec. 57, Code 1940; Tit. 26, Secs. 384, 385, Cumulative Pocket Part, Code 1940.

The rules of pleading in Alabama require that all matters essential to plaintiff's right to relief be stated with sufficient certainty, clearness and precision to enable defendant to prepare to defend against the action and so as to allow the court and jury to understand the allegations. *Cauble v. Boy Scouts of America,* 250 Ala. 152, 33 So. 2d 461; *Dudley v. Martin,* 241 Ala. 435, 3 So. 2d 7; *Alabama Great Southern R. v. Cardwell,* 171 Ala. 274, 55 So. 185; *Weller and Co. v. Camp,* 169 Ala. 275, 52 So. 929.

The complaint alleges that at the time complained of "Plaintiff was an employee of Calumet & Hecla Consolidated Copper Co. (Wolverine Tube Division) engaged in his said employment at the plant of his said employer in Decatur, Alabama," and the defendants "in order to make the strike effective, and in order to prevent plaintiff and

various other employees of plaintiff's employer, who desired to continue working for their said employer, notwithstanding said strike, from entering their employer's place of business, established and maintained from, to-wit, July 18, 1951 to September 24, 1951, a picket line along and in said public street at a point thereon in close proximity to said plant, consisting of great numbers of persons, some of whom were walking at various and sundry intervals during said period in a close and compact circle across the entire traveled portion of said street, and said pickets, on or about July 18, 1951, by force of numbers, threats of bodily harm to plaintiff and damage to his property, and by force and violence consisting in taking hold of the automobile in which plaintiff was riding and thereby stopping it, and consisting of some of said pickets standing or walking in front of said automobile, blocked said public street and made passage to said plant over the same impossible for plaintiff and for others similarly situated, and defendants thereby willfully and maliciously prevented plaintiff from going to and from said plant and from engaging in his said employment, and caused plaintiff to lose much time from his work, to-wit, from July 18, 1951 to August 22, 1951, and to lose earnings from his employment at said plant which he would have received had he not been prevented as aforesaid from going to and from said plant * * *."

We think it would be indulging in hypercriticism to say that the complaint was demurrable because it did not spell out in so many words that work was available to the plaintiff at his employer's plant. The complaint alleges that plaintiff had a job; that he was on his way to it; that defendants unlawfully and maliciously prevented him from getting there, and as a consequence he lost wages on ac-

count thereof. These allegations of fact are sufficient to show that work was available to plaintiff had he been able to go to his employer's plant. Indeed, defendants under the plea to the general issue in short by consent attempted to prove that no work was available to plaintiff because of the strike at the plant. The evidence on this point was in conflict and resolved against defendants by the jury.

It is not necessary that plaintiff allege the name of the agent or agents through whom the defendant union was acting. *Abigdon Mills v. Grogan*, 167 Ala. 146, 52 So. 596. The criticism that Count 2 is vague and indefinite is also without merit. The demurrer to each count was properly overruled.

Appellants assign as error the action of the trial court in overruling appellants' motion for new trial, which motion recited as grounds that: (1) The verdict is contrary to the evidence, (2) the verdict is not sustained by the evidence, (3) the verdict is contrary to the great weight of the evidence, and (4) the verdict is contrary to law.

Appellants' argument is based on the theory that plaintiff is not entitled to any recovery against the defendants if plaintiff's loss of working time and wages was due to a closing of the plant by his employer and not due to any action on the part of the defendants which may have prevented plaintiff from crossing the picket line. Appellants argue that the evidence clearly shows that plaintiff's employer closed the plant to all hourly-rated employees pursuant to an agreement between the employer and the union, and that even though plaintiff had been able to cross the picket line, no work would have been available to him. The record in this case is very lengthy, making it impractical to set out the evidence in this opinion. It is sufficient to say that there was evidence introduced on

behalf of the plaintiff which contradicts the defendants' evidence, and which if believed, would justify a verdict for planitiff. Under these circumstances, we will not overrule the trial court's ruling on the motion for new trial. *Cobb v. Malone,* 92 Ala. 630, 9 So. 738; *Smith v. Smith,* 254 Ala. 404, 48 So. 2d 546; *Bell v. Nichols,* 245 Ala. 274, 16 So. 2d 799.

A directed verdict for the defendants can only be justified upon the theory that the plaintiff upon whom rests the burden of proof to establish the right to recover, has wholly failed to adduce evidence to support his cause of action, or that the testimony of plaintiff's own witnesses, without conflict, makes out the defense of the opposing party. If plaintiff makes out a prima facie case, and the defense is dependent upon oral testimony, the court must leave the credibility of the evidence to the jury and not direct a verdict for the defendant. *Schoenith, Inc. v. Forrester,* 260 Ala. 271, 69 So. 2d 454; *Byars v. Alabama Power Co.,* 233 Ala. 533, 172 So. 621, and cases cited therein. In this jurisdiction, there need be only a scintilla of evidence to require reference of the issue raised thereby to the jury. *Barber v. Stephenson,* 260 Ala. 151, 69 So. 2d 251. Appellants contend that plaintiff introduced no evidence to show that plaintiff was damaged by any illegal conduct on the part of the defendants.

The record reveals that plaintiff introduced evidence tending to prove the following: Plaintiff was a regular employee of the Calumet and Hecla Consolidated Copper Company (Wolverine Tube Division). He worked regularly at an hourly rate of pay and averaged approximately 50 hours a week for the six months preceding July 18, 1951. On occasions when no work was available, the employees were notified in advance by the company. Plaintiff had

not been notified that there would be no work on July 1[illegible] 1951, and he and numerous other employees went to th[illegible] plant on that morning expecting to work. When thes[illegible] employees arrived at the approaches to the plant, the[illegible] found that a strike was in progress, directed by officials o[illegible] defendant union, including defendant, Michael Volk. Th[illegible] union placed a picket line across the street leading int[illegible] the plant. Plaintiff attempted to drive through the picke[illegible] line, but large numbers of men closed in around his car[illegible] making it impossible to go forward. One of the striker[illegible] held onto the car door handle, and there were shouted[illegible] threats to turn plaintiff's car over, along with other threat[illegible] ening shouts from the strikers. After some time, plain[illegible] tiff left the scene and returned to his home. No hourly[illegible] rated employees were able to cross the picket line until[illegible] August 22, 1951, when, with the aid of a large number of[illegible] law enforcement officers, approximately 200 employees[illegible] entered the plant and resumed work.

Frank W. Oakes, who was Industrial and Public Relations Director for the plant and who represented the management at a pre-strike meeting with the union, denied telling union officials that the plant would be closed to hourly-rated employees during the strike. Considering the evidence introduced by plaintiff, it was not error to refuse to direct a verdict for defendants.

Appellants assign as error the admission of testimony concerning events transpiring on August 22, 1951 over objection that such testimony was irrelevant, incompetent, immaterial and illegal for the reason that the pleading confined the issue to events occurring within a period which ended on August 21, 1951. The court admitted the evidence for the purpose of proving the allegations of Count 2 of the complaint which alleges a conspiracy to prevent

plaintiff's engaging in his employment. The evidence was admissible for this purpose. In the recent case of *Barber v. Stephenson*, 260 Ala. 151, 69 So. 2d 251, Mr. Justice Simpson, speaking for the court, said:

> "It is contended for all the defendants that there was no proof that they had entered into any sort of conspiracy prior to October 3, 1947, the onset date of the alleged combination. Concededly there was no positive evidence to that effect, but a conspiracy need not alone be established by that character of evidence. Indeed, seldom is such the case. It is only by looking to the conduct of the alleged conspirators during the progress of the conspiracy and the end result achieved that usually such a fact is established. And to that end it is proper to consider evidence extending over a considerable period, both before and after the date of the alleged combination and even after its termination, just so the proof has a tendency to establish the ultimate fact. Scheele v. Union Loan & Finance Co., 200 Minn. 554, 274 N. W. 673; Blakeney v. State, 31 Ala. App. 154, 13 So. 2d 424, certiorari denied, 244 Ala. 262, 13 So. 2d 430; 15 C. J. S. Conspiracy, §92, p. 1143."

Under the above-stated principles, evidence of actions of the pickets on August 22, 1951 was clearly admissible to prove a conspiracy. On this theory it was also correct to admit evidence of an incident occurring on August 20, 1951, in which strikers used force to prevent a locomotive from pulling cars loaded with raw materials into the plant. All of the incidents have probative value toward the determination of whether or not a conspiracy existed on the part of the defendants.

The question is raised as to the admissibility of a motion picture film which the trial court allowed to be introduced into evidence over defendants' objection. The film purported to show action taking place on the picket line on

the morning of August 22, 1951, which was the day plaintiff and others returned to work. The picture was taken by the witness McGregor who testified to facts tending to identify the film and verify it as a true representation of the action he saw on that occasion. He also testified as to the technical and mechanical features of producing the film and showing it to the jury in such a way as to accurately portray the events filmed. The introduction of the film was objected to on the grounds that it was a copy and not the original film, that it had been cut and edited, and that it was not a continuous picture, but had been taken at selected intervals during the morning.

The best evidence rule does not apply to this situation so as to make the copy inadmissible. The motion picture does not of itself prove an actual occurrence but the thing reproduced must be established by the testimony of witnesses. *Decamp v. United States*, 10 Fed. 2d 984. The motion picture as exhibited to the jury is the pictorial communication of the witness' testimony and is used to convey the observations of the witness to the jury more fully and accurately than the witness can convey them verbally. *Brown v. State*, 186 Tenn. 378, 210 S. W. 2d 670. The picture is not admissible unless a witness testifies that the picture as exhibited accurately reproduces the objects or actions which he observed. *Pacific Mutual Life Ins. Co. of California v. Marks*, 230 Ala. 417, 161 So. 543; *City of Anniston v. Simmons*, 31 Ala. App. 536, 20 So. 2d 52, cert. den. 246 Ala. 153, 20 So. 2d 54; *Louisville & Nashville R. R. v. Sullivan*, 244 Ala. 485, 13 So. 2d 877; *Kansas City, Memphis & Birmingham R. R. Co. v. Smith*, 90 Ala. 25, 8 So. 43; *Alabama Trunk & Luggage Co. v. Hauer*, 214 Ala. 473, 108 So. 339.

Where a witness testifies that the picture is an accurate reproduction of the matter it purports to portray, the fact that it is not the original film or that it has been cut to the extent of adding titles showing the time certain pictured events occurred does not necessarily make the film inadmissible. These matters affect the credibility and the weight to be given the picture by the jury.

There is no doubt that motion pictures are subject to change and falsification, as is the testimony of any witness, but protection against falsification or misspresentation lies in the requirement of preliminary proof that the picture is an accurate reproduction of the event which it depicts and in the opportunity for cross-examination of the witness making such proof. *People v. Dabb*, 32 Cal. 2d 491, 197 P. 2d 1; *Heiman v. Market Street Ry. Co.*, 21 Cal. App. 2d 311, 69 P. 2d 178.

The objection that a motion picture film which does not show a continuity of action is misleading and therefore inadmissible is treated in *McGoorty v. Benhart*, 305 Ill. App. 458, 27 N. E. 2d 289, in which the court held that where, as here, the photographer testified how the pictures were taken at intervals and at different times, the jury would not be misled.

The determination of the sufficiency of the preliminary proofs offered to identify the photograph or to show that it is an accurate representation of the objects which it purports to portray is a matter within the sound discretion of the trial court and will not be reviewable except for gross abuse. *McKee v. State*, 253 Ala. 235, 44 So. 2d 781.

It is likewise a matter for the trial court in the exercise of his sound discretion to determine whether the motion picture will aid the jury or tend to confuse or

prejudice the jury. *Morris v. E. I. duPont de Nemours & Co.*, 346 Mo. 126, 139 S. W. 2d 984; *State v. United Railways & Electric Co. of Baltimore*, 162 Md. 404, 159 A. 916; *Rogers v. City of Detroit, Department of Street Railways*, 286 N. W. 167, 289 Mich. 86; *Denison v. Omaha & C. B. St. Ry. Co.*, 280 N. W. 905, 135 Neb. 307; *Boyarsky v. G. A. Zimmerman Corp.*, 270 N. Y. S. 134, 240 App. Div. 361.

In this case, testimony showed that McGregor operated the motion picture camera taking the picture. He had been trained in photography and the exhibition of motion pictures. He sent the film to the Eastman Laboratory in Chicago to be developed as is the usual practice among those making industrial motion pictures. When it was returned to him, he cut off the unexposed portions on each end of the film and spliced in titles giving the time each pictured event occurred. The film was sent again to the Eastman Laboratory where the copy which was introduced was made. McGregor testified that the film introduced and shown in court is identical to the original, and depicts the objects and action exactly as he took it. McGregor also testified to other details of making and exihibting the picture which were necessary to a proper foundation for admission of the film but which are unimportant to the question now before us. Captain C. M. Thorsen, of the Alabama Highway Patrol, who was on duty at the scene of the strike on August 22, 1951, also testified that the film as shown to the jury accurately portrayed the action he had observed there on that morning.

It does not appear that the trial judge abused his discretion by allowing this film to be introduced.

Charge No. 2, given at the request of plaintiff, is as follows:

> "2. If after considering all of the evidence in this case you are reasonably satisfied therefrom that the plaintiff is entitled to recover, you may include in your verdict what the law knows as punitive or exemplary damages; that is, such amounts as in your judgment and discretion is reasonable as a punishment to the defendants for their conduct on the occasion complained of and to make an example to deter the defendants and others from similar conduct in the future."

The charge is not subject to defendants' ground of objection that it does not instruct that punitive damages may be awarded only if the acts of defendants were found to have been done willfully, wantonly, or maliciously. The charge predicates the awarding of punitive damages on a determination that plaintiff is entitled to a recovery. In order to determine that plaintiff is entitled to a recovery the jury must find that defendants' acts were willfully and maliciously done, since malice is an essential element of the cause of action alleged in plaintiff's complaint. Wherever malice is an ingredient of the cause of action, the plaintiff's recovery may include punitive damages in the sound discretion of the jury. *Penney v. Warren,* 247 Ala, 120, 115 So. 16.

Appellants further argue that the charge was erroneously given because it fails to instruct that punitive damages could be awarded only if the jury determined that plaintiff suffered actual damages. This argument is without merit for the subject is fully covered in the oral charge given by the judge. Such being the case, is any error existed, it is not reversible error. *Marbury Lumber Co. v. Lamont,* 198 Ala. 566, 73 So. 923; *Western*

Union Telegraph Co. v. Gorman, 237 Ala. 146, 185 So. 743; *McGough Bakeries Corp. v. Reynolds*, 250 Ala. 592, 35 So. 2d 322. The oral charge also cured any possible defect in plaintiff's requested Charge No. 3, given by the court.

Appellants assign as error the giving of an unnumbered explanatory charge at the request of the plaintiff. However, as the charge appears in the transcript of the record, it does not contain the endorsement by the judge as required by Sec. 273, Tit. 7, Code 1940, and, therefore, presents nothing for review. Appellants filed a motion to set aside submission and correct the record to show that the charge was actually properly endorsed by the judge. This motion is not granted for it would be unavailing to do so since the subject matter of the charge was fully and correctly covered in the court's oral charge.

Appellants argue that Charge No. 9, given at the request of plaintiff, authorizes the jury to find for plaintiff upon the basis that unlawful picketing alone is sufficient to create a cause of action. We are not convinced that the charge necessarily must be so construed. Where a charge is susceptible of two constructions, appellate courts will indulge the construction which will sustain rather than condemn. *Birmingham Southern Ry. Co. v. Harrison*, 203 Ala. 284, 82 So. 534; *Alabama Consolidated C. & I. Co. v. Heald*, 171 Ala. 263, 55 So. 181.

The refusal of the court to give defendants' requested charges numbered 40 and 28 are separately assigned as error and argued. The principles of law contained in these charges weer covered in the court's oral charge and in charges given at the request of the defendants; therefore, the refusal to give these charges was not error. *Lindsey v. Barton*, 260 Ala. 419, 70 So. 2d 633; *Atlantic Coast Line RR Co. v. French*, 261 Ala. 306, 74 So. 2d

266; *City of Bessemer v. Cloudus*, 261 Ala. 388, 74 So. 2d 259; *Lackey v. Lackey*, 262 Ala. 45, 76 So. 2d 761.

Charge 33, requested by defendants, is misleading in that it would deny recovery to plaintiff on Count 2 of the complaint if the jury should find that at some indefinite time prior to the strike the defendants believed or had reason to believe no work was available to plaintiff in the plant. Defendants' requested charges numbered 26 and 27 are subject to the same criticism.

Defendants' requested charges 3 and 36 were correctly refused as singling out and placing undue emphasis upon the evidence contained in interrogatories introduced by plaintiff. *Huntsville Knitting Mills v. Butner*, 200 Ala. 288, 76 So. 54; *Lester v. Jacobs*, 212 Ala. 614, 103 So. 682.

Defendants' counsel objected to asking defendants' witnesses Duncan and Starling on cross-examination what their salaries were as officials of defendant union. The testimony was allowed to be introduced by the trial judge as having a bearing on the credibility of the witnesses. It was within the discretion of the trial court to allow this testimony. Wide latitude is allowed on cross-examination to bring out facts tending to show bias on the part of a witness. The extent of such cross-examination is within the sound discretion of the trial court. *Hackine v. State*, 212 Ala. 606, 103 So. 468; *Drummond v. Drummond*, 212 Ala. 242, 102 So. 112; *Ex parte Ford*, 213 Ala. 410, 104 So. 840; granting certiorari *Ford v. State*, 20 Ala. App. 633, So. 838.

Grounds 95 and 96 of defendants' motion for new trial contend that the following statements by plaintiffs' counsel during his closing argument were so grossly improper and prejudicial as to be grounds for granting a new trial:

> "The only way that you can reach a labor union and make it sorry for what it has done is through its pocket book because it has no conscience and you can't put it in jail. The only way you can reach it is through its pocket book."

> "My only worry is that you won't return your verdict for enough money. You know the court can reduce your verdict if you return an amount which is too high, but there is no way in the world that anyone can increase your verdict if you make it too low."

There was no objection to the argument at the time it was made. The question of the propriety of the argument was raised for the first time in defendants' motion for a new trial. Therefore, in order to work a reversal, the argument must have been so grossly improper and highly prejudicial that, even if appropriate objection had been interposed, its influence could not have been counteracted by proper action. *Birmingham Railway Light and Power Co. v. Gonzales,* 183 Ala. 273, 61 So. 80, Ann. Cas. 1916 A. 543; *Brotherhood of Railroad Trainmen, et al. v. Jennings,* 232 Ala. 438, 168 So. 173. It does not appear that the arguments are so highly prejudicial and improper as to war ant a reversal. In fact, an argument very similar to the first one listed above was considered by this court in *Tutwiler Coal, Coke and Iron Co. v. Nail,* 141 Ala. 374, 37 So. 634, and was held to be proper.

The excessiveness of the verdict was assigned as grounds for new trial and argued on appeal. Where, as here, the verdict may include punitive damages, the imposition of such damages must be left to the discretion of the jury, whose judgment will not be interfered with unless the amount is so excessive as to show passion or prejudice, or some other improper sentiment. *King v. Dozier,* 252 Ala. 631, 42 So. 2d 254; *Abington Mills v.*

Grogan, supra; Powell v. Bingham, 239 Ala. 515, 196 So. 160, cert. den. 29 Ala. App. 248, 196 So. 154; *Tennessee Coal, Iron & R. Co. v. Aycock,* 248 Ala. 498, 28 So. 2d 417.

Considering that the jury was properly instructed as to punitive damages, and considering the nature of the wrong complained of, and the necessity of preventing similar wrongs, as the court in *Coleman v. Pepper,* 159 Ala. 310, 49 So. 310, said that we must do, the verdict in this case cannot be held to be excessive.

We find no reversible error in the record; therefore, this case should be, and is, hereby affirmed.

Affirmed.

Lawson, Goodwyn and Merrill. JJ., concur.

THE SUPREME COURT OF ALABAMA

Thursday, March 22, 1956

The Court met pursuant to Adjournment

Present: Chief Justice Livingston and Associate Justices Lawson, Goodwyn, and Merrill.

8 Div. 751 Internatinal Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., an Unincorporated Organization, and Michael Volk, v. Paul S. Russell.	MORGAN CIRCUIT COURT

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It is therefore considered, ordered, and adjudged that the judgment of the Circuit Court be and the same is hereby in all things affirmed.

It is further considered, ordered, and adjudged that the appellant, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, (UAW-CIO), an Unincorporated Organization, and Michael Volk, and National Surety Corporation, New York, New York, surety on the supersedeas bond, pay the amount of the judgment of the Circuit Court, and ten per

centum (10%) damages thereon, and interest, and the costs of appeal of this Court and of the Circuit Court, for which costs let execution issue accordingly.

Part B

JUDGMENT ON MOTION FOR REHEARING

Entered June 21, 1956

(R. 716)

THE SUPREME COURT OF ALABAMA

Thursday, June 21, 1956

The Court met pursuant to Adjournment

Present: Chief Justice Livingston and Associate Justices Lawson, Simpson, Stakely, Goodwyn, Merrill, and Spann.

8 Div. 751 Internatinal Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., an Unincorporated Organization, et al., v. Paul S. Russell.	MORGAN CIRCUIT COURT

It is ordered, that the application for rehearing filed by the appellants in this cause on April 5, 1956, after being duly examined and considered by the Court, be and the same is hereby overruled. [No opinion written on rehearing].

[June 21, 1956, Certificate of Affirmance and Copy of Opinion reissued to Clerk Morgan Circuit Court upon overruling of application for rehearing.]

APPENDIX C

OPINION OF SUPREME COURT OF ALABAMA

Entered March 13, 1953

(R. 722)

Stakely, Justice.

This suit was brought by Paul S. Russell (appellant) against International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., an unincorporated organization, Howard Hovis, Felton Dyer, Ralph Webster and Michael Volk (appellees). The individuals named are residents of the State of Alabama and are members of the union. The defendants filed a plea to the jurisdiction to which the plaintiff demurred. The court overruled the demurrer to the plea and because of this adverse ruling, the plaintiff took a nonsuit and brings this appeal on the record, as authorized by §819, Title 7, Code of 1940.

The complaint consists of two counts and claims damages of the defendants for unlawfully and maliciously preventing plaintiff from engaging in his employment. Count 1 will appear in the report of the case. Count 2 is similar to count 1, except that it alleges a conspiracy among the defendants in connection with the same matters alleged in count 1.

An examination of the allegations of count 1 will show that the defendants prevented plaintiff from engaging in his employment by (1) actual force and violence, (2) mass picketing which blocked a public street which was the only means of access to the place of employment and (3)

threats of personal injury and property damage. The damages claimed are for loss of time from employment, mental anguish and punitive damages.

The defendants' plea to the jurisdiction, which will also appear in the report of the case, is based on the following theories: First, that Section 7 of the Federal Act (29 U. S. C. A., §157) provides that employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. Second, that Section 8 (b) (1) of the Act (29 U. S. C. A., §158 (b) (1)), provides that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Third, that the use of force and violence in connection with the picketing alleged in the complaint constituted an unfair labor practice under Section 8 (b) (1) (A) of the Act (29 U. S. C. A. §158 (b) (1) (A)), in that it interfered with the rights of employees to work notwithstanding the strike, a right given them by Section 7 of the Act. Fourth, that Section 10 of the Act (29 U. S. C. A., §160), conferred jurisdiction upon the National Labor Relations Board to prevent any unfair labor practice listed in Section 8 of the Act.

The allegations of the plea according to the defendants show that the act referred to in the plea gave the National Labor Relations Board exclusive jurisdiction of the controversy alleged in the complaint and deprived any court of jurisdiction of it. The constitutional question is raised that "for the state court to entertain appellant's complaint and grant the relief therein prayed for would be

in violation of Article 1, Section 8, Paragraph 3, of the Constitution of the United States, for the reason that said constitutional provision grants to the Congress of the United States exclusive jurisdiction to regulate commerce between the several states, and Congress having undertaken to regulate said commerce by the National Labor Relations Act, as amended, any action by the state court upon the subject matter therein regulated would be in derogation of the authority granted to, and exercised by, Congress under the said constitutional provision."

The writer feels very much as Justice McClellan felt when he wrote the case of *Western Union Telegraph Co. v. Smith,* 200 Ala. 65, 75 So. 393. He said in effect that he would prefer that the Supreme Court of the United States express its judgment on the question before committing the Supreme Court of Alabama to a profound change in law from what has been regarded as established law in Alabama. His statement was made in connection with a series of cases, cited by appellees in this case, which this court decided in connection with the Acts of Congress dealing with interstate telegraph mesages. At one time the state law had permitted a suit to recover damages for mental anguish because of a mistake in or failure of delivery of an interstate message. When the Supreme Court of the United States held, however, that the Federal enactment ousted the state court of jurisdiction in regard to interstate telegraph messages, this court in a series of decisions held that the decision of the Supreme Court of the United States was controlling, the state court had no jurisdiction and the recoverable damages were controlled by the Federal Law. *Western Union Telegraph Co. v. Beasley,* 205 Ala. 115, 87 So. 858; *Western Union Telegraph Co. v. Barbour,* 206 Ala. 129, 89 So. 299; *Western Union Telegraph Co. v. Speight,* 254

U. S. 17, 41 S. Ct. 11, 65 L. Ed. 104. In one of those cases where it appeared that the Federal Act had ousted the state court of jurisdiction, it was held for example that where the plaintiff failed to pay for a repeated message, his damages under the Federal Act were limited to the cost of the telegram, unless the failure to transmit correctly was due to wilful misconduct of the company or to its gross negligence. *Ex parte Priester*, 212 Ala. 271, 102 So. 376.

Under the concept in this country of liberty and the pursuit of happiness, every man has the right to pursue a lawful occupation. This right is in the nature of a property right and the authorities in this state hold that an action at law lies for any unlawful interference therewith. *Bowen v. Morris*, 219 Ala. 689, 123 So. 222; *Local 204 of Textile Workers Union of America v. Richardson*, 245 Ala. 37, 15 So. 2d 578; *Carter v. Knapp Motor Co.*, 243 Ala. 600, 11 So. 2d 383, 144 A. L. R. 1177. Furthermore any person engaged in a lawful pursuit has the right to pass on the public streets without interference, threats or intimidation. *Hardie-Tynes Mfg. Co. v. Cruse*, 189 Ala. 66, 66 So. 657; *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360. Furthermore it is a criminal offense in Alabama for one to use force, threats or intimidation to prevent another from engaging in a lawful occupation. Code of 1940, Tit. 14, §57; Code of 1940, Tit. 26, §§384, 385, Pocket Part; *Hardie-Tynes Mfg. Co. v. Cruse, supra.*

There is no mention in the Federal Act whatsoever of the plaintiff's right to recover damages for torts suffered by him when encountering a mass picketing line and yet the State of Alabama in its Constitution has expressly provided in Section 13, "That all courts shall be open;

and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay."

In *Marbury v. Madison,* 1 Cranch 137, 2 L. Ed. 69, the Supreme Court of the United States said:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."

In *Janney v. Buell,* 55 Ala. 408, this court said:

> "It is a fixed principle of the common law, that if a right exists, an appropriate remedy for its enforcement necessarily follows as an incident."

See also *Hardie-Tynes Mfg. Co. v. Cruse,* 189 Ala. 66, 66 So. 657.

Section 7 of the Federal Act (29 U. S. C. A., §157) is:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Section 8 of the Act (29 U. S. C. A., §158) defines unfair labor practices of both employers and labor organizations; subsection (b) (1) (A) is the portion of Section 8 here applicable and is as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *."

In discussing the effect of Section 8 (b) (1) (A) in *Sunset Line & Twine Co.*, 79 N. L. R. B. 1487, at 1504, the Board said:

> "Under this Section, one of the new statutory provisions in which *union* unfair labor practices are defined and proscribed, the essential elements of a violation are three-fold. There must be (1) restraint or coercion, (2) practiced by a labor organization or its agents, (3) against employees in the exercise of rights guaranteed in Section 7 of the Act.
>
> "In this case the Trial Examiner accepted the General Counsel's premise that the third element is present, namely, the protected right of employees to 'refrain from striking,' that is, to work in the face of a strike.
>
> "We agree that employees enjoy that protected right under the Act, as amended, and that there was interference with its exercise in this case."

What we are saying is that the defendant charged in its plea that the action complained of in the complaint was an unfair labor practice under the Act and to us it appears that the defendants' conduct was an unfair labor practice. The defendant, according to its contention, claims that since it is an unfair labor practice, the National Labor Relations Board has exclusive jurisdiction

to deal with the conduct, but it is the position of the plaintiff that while the acts complained of may be an unfair labor practice, they are still civil torts under the common law and the Federal Act gives the plaintiff no remedy for damages for such wrongs suffered by the plaintiff.

Subsection (a) of Section 10 empowers the Board to prevent any person from engaging in any unfair labor practice. Subsection (c) of Section 10 provides, in part, as follows:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act; Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of Section 8 (a) (1) or Section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order."

According to our understanding the National Labor Relations Board has consistently held that it does not have jurisdiction to award damages to one situated as the plaintiff in the case at bar for injuries sustained by him

rom unlawful conduct, such as these defendants are al-
ged to have committed. *Colonial Hardwood Flooring*
o., 84 N. L. R. B. 563; *United Mine Workers*, 92 N. L.
. B. 916. See also *Progressive Mine Workers of America*
National Labor Relations Board, 187 F. 2d 298, 307.
n other words, it results from the holdings of the board
s to its power and jurisdiction that the only action which
could have taken in connection with the alleged acts
this case, was a cease and desist order, with the re-
uirement of posting of notices of the compliance.

So far as we are aware, there are only two instances
which the board may make an order for payment of
oney from one party to the other: (1) under §10 (c)
f the Act, when the Board orders reinstatement with
ack pay of an employee who has been discharged on
ccount of unfair labor practice defined in §8 (a) (3)
nd §8 (b) (2) of the Act; (2) when the employer is re-
uired to refund to his employees dues withheld from
eir pay and turned over to an employer dominated
nion. *Virginia Electric & Power Co. v. National Labor*
elations Board, 319 U. S. 533, 63 S. Ct. 1214.

Accordingly since the Board does not have jurisdiction
award damages to the plaintiff for the wrongs alleged
the complaint, if the plea is sustained, the plaintiff has
ffered an alleged injury for violation of a recognized
ght but has no remedy for its redress.

We come now to the test to be applied in determining
hether the act deprives state courts of jurisdiction and
this connection we point out again that the act in ques-
on does not in express terms deprive any court of juris-
ction and if the matter complained of in the complaint
withdrawn from jurisdiction of state courts, it can

only be by implication. The Supreme Court of the United States in *Texas & Pacific Railroad Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, said:

> "As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not, in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

The Supreme Court of the United States has held that neither the National Labor Relations Act nor the Labor Management Relations Act has deprived the states of their police power to deal with force and violence accompanying strikes in industries affecting interstate commerce. *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154. The holding in that case may be summarized with the statement that the state order enjoining strikers from engaging in mass picketing, etc., is based on two factors: (1) The order of the state board did not deprive any person of any right granted by the Federal Act and (2) the state action did not interfere with the functions of the Federal Board. See also *International Union v. Wisconsin Employment Relations*, 336 U. S. 245, 69 S. Ct. 516,

93 L. Ed. 651; *Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, Electric, Railway & Motor Coach Employees of America*, 38 So. 2d (Miss.) 765.

In *Faribault Daily News v. International Typographical Union*, 53 N. W. 2d (Minn.) 36, there is an analysis of the various decisions of the Supreme Court of the United States. In this case the Minnesota Court said:

> "We have thus considered all the decisions of the Supreme Court of the United States directly applicable to the question presented. Citation of these cases forecloses the argument that might otherwise be made that the passage of the comprehensive federal labor relations act removes the entire field of labor relations from state control, except where jurisdiction is specifically granted. The court has definitely stated that the federal act is not a police act, and that in areas where the exercise of police power is called for the state and its courts have jurisdiction. In such a case, congress has not protected the union conduct which the state has forbidden, and the conduct is government by the State."

The foregoing decision seems to clearly hold that the act now under discussion does not interfere with the traditional sovereignty of a state, which would seem to include the power and duty of providing courts for the redress of injuries to the person and property of its citizens. As was said in *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U. S. 287, 61 S. Ct. 552,

> "We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club."

It has been held that the state has a right to prosecute offenders in its criminal courts for infractions of its laws in a labor dispute. *Blue v. State,* 67 N. E. 2d (Ind.) 377.

We, of course, realize that there is a difference between the action of the state in providing a judicial remedy for the redress of wrongs which fall under the exercise of the police powers of the state and of providing redress to persons for a civil tort as for instance violation of rights by unlawful picketing, for the recovery of damages to which they may be entitled. It seems to follow, however, that where the act does not deprive the state of its police power, it certainly does not deprive the state of its judicial power and, therefore, the right of this plaintiff under the constitution of this state to resort to the courts of the state for the vindication of such of his rights as may have been violated, when no remedy is given in the act for redress from such violation, except a cease and desist order.

It is argued that where the Federal Act takes jurisdiction of the subject matter inadequacies of remedy cannot be considered, since the power lies with Congress to give an adequate remedy. In this connection we refer to *Slocum v. Delaware, L. & W. R. Co.,* 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795, where it was said:

> "Our holding here is not inconsistent with our holding in Moore v. Illinois Central R. Co., 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful dis-

charge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees."

In *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, the Supreme Court of the United States said:

> "Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, that Board could not give the entire relief here sought. * * *
>
> "Whether or not judicial power might be exerted to require the Adjustment Board to consider individual grievances, as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity. * * *
>
> "In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction."

See also *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768, 72 S. Ct. 1022.

It must be conceded as was noted in *Texas & Pacific Railway Company v. Abilene Cotton Oil Company, supra*, that if the action in the state court is inconsisetnt with or violates a right given by the Federal Act or if the state action interferes with the administrative authority en-

trusted by Congress to the Board of National Labor Relations, the state action must be stricken down, because it is repugnant to or destroys or impairs the efficiency of the Federal Act. But in the case at bar it does not appear how the prosecution of the present suit can take away any right guaranteed to any person by the Federal Act. The alleged conduct of the defendants was wrongful and in violation of the laws of Alabama. There is no implication in the Federal Act which grants the defendants immunity for such wrongful conduct. As we have undertaken to say, the Federal Act itself shows that the alleged conduct of the defendants was wrongful and we believe that the mere fact that such conduct is an unfair labor practice, does not under the Act deprive the state court of jurisdiction to award damages for such conduct, there being nothing in the Act to deprive the plaintiff of his rights or to give the plaintiff a forum in which such rights can be adjudicated.

Neither legislative nor judicial action by the state is prohibited by the Act unless it interferes with the function of the National Labor Relations Board or unless it is repugnant to a right granted by the Federal Act. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234; *International Union of United Automobile, Aircraft and Agricultural Implement Workers v. O'Brien*, 339 U. S. 454, 70 S. Ct. 781, 94 L. Ed. 978; *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U. S. 301, 69 S. Ct. 584, 93 L. Ed. 691; *Hill v. Florida*, 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782. See also *Textile Workers Union v. Arista Mills Co.*, 4 Cir., 193 F. 2d 529. In this last cited case the court said:

> "Where, however, substantive rights with respect to such matters as positions or pay are created by bargaining agreements, there is no reason why the courts may not enforce them even though the breach of contract with regard thereto may constitute also an unfair labor practice within the meaning of the Act."

In *Masetta v. National Bronze & Aluminum Foundry Co.*, 107 N. E. 2d (Ohio App.) 243, which was a class suit by a group of employees against the employer for breach of a collective bargaining agreement, it was contended that the Federal Act deprived the court of jurisdiction. The court said:

> "We believe that any doubt as to jurisdiction in this case should be resolved in favor of permitting the door to be open to suits of this character in the state courts, in the absence of a clear and definite contrary declaration by the National Congress, and in the absence of judicial authority to the contrary."

As we have undertaken to show, the National Labor Relations Board has no authority to award damages to one who was wronged as alleged in the complaint in the case at bar. Its only authority to prevent such an unfair labor practice is by the issuance of a cease and desist order. It does not appear how the maintenance of this suit by the plaintiff can interfere with that function of the Board. Whatever may be the outcome of this suit, the Board could and can issue a cease and desist order. A judgment in this suit will not be binding on the Board. The essential elements of res adjudicata would be lacking because this suit is for the enforcement of a private right of the plaintiff and the Board's orders are for the enforcement of public rights. As was said in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795, "If a court

in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board".

In *Barile v. Fisher and Local No. 302, United Electrical Radio & Machine Workers of America, C.I.O.*, 197 Misc. 493, 94 N. Y. S. 2d 346, 17 Labor Cases, 76,969, §65,578, the plaintiff brought suit against a labor organization alleging that it had expelled him by reason of his refusal to pay union dues and had thereby caused him to lose his employment with his employer whose contract with the union contained a maintenance of membership provisions, and in addition that the union had maliciously prevented him from obtaining other employment by notifying various other unions of his expulsion. On motion to dismiss the complaint on the ground that the state court had no jurisdiction, the court said:

> "* * * However, the complaint is not based upon alleged violations of the Federal statute, but is based upon common law tort principles. The fact that the grievance complained of in a common law tort action may also constitute an unfair labor practice under the Federal statute does not deprive the state courts of jurisdiction over the common law tort action. The motion for dismissal for lack of jurisdiction is therefore denied."

We do not understand that *Ryan v. Simons*, 100 N. Y. S. 2d 18, 98 N. E. 2d 707, is contrary to the last mentioned decision, because in the case at bar it cannot be said that the plaintiff must first avail himself of the administrative remedy set up by the Federal Act, because, as we have shown, there is no administrative remedy by which the plaintiff can be allowed damages for the wrongs which he is alleged to have suffered.

With no authoritative holding from the Supreme Court of the United States on the matter now before us, it is our view that the court was in error in overruling the demurrer to the plea to the jurisdiction of the state court. We think the demurrer should have been sustained.

It is, accordingly, our conclusion that the court was in error and the judgment of the lower court is accordingly reversed and the cause is remanded.

Reversed and remanded.

All the Justices concur.

APPENDIX D

Part A

PERTINENT PORTIONS OF RECORD

AMENDED COMPLAINT—Filed December 15, 1952

(R. 43)

Comes the plaintiff in the foregoing cause and amends his complaint by striking the following defendants, namely, Local 68 of International Union United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., an unincorporated organization; Congress of Industrial Organizations, an unincorporated organization; United Textile Workers of America, A.F.L., an unincorporated organization; Local 88 of United Textile Workers of America, A.F.L., an unincorporated organization; American Federation of Labor, an unincorporated organization; and Tommy Wilson, and amends Counts One and Two of the complaint so that the same will read as follows, respectively:

Count One. The plaintiff claims of the defendants the sum of Fifty Thousand ($50,000.00) Dollars as damages for that on and prior to July 18, 1951, the plaintiff was an employee of Calmet and Hecla Consolidated Copper Company (Wolverine Tube Division) engaged in his said employment at the plant of his said employer in Decatur, Alabama, and customarily went to and from said plant in pursuance of his employment on and over a public street in Decatur, Morgan County, Alabama, known as Railroad Avenue, which said street was the only means of ingress

to and egress from said plant. At the time hereinabove and hereinafter mentioned the defendant, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., was the bargaining agent for certain of the employees of plaintiff's said employer, and called a strike against said employer on, to-wit, July 17, 1951, to commence on July 18, 1951. The defendants, in order to make said strike effective, and in order to prevent plaintiff and various other employees of plaintiff's employer, who desired to continue working for their said employer notwithstanding said strike, from entering stheir employer's place of business, established and maintained from, to-wit, July 18, 1951 to August 22, 1951, a picket line along and in said public street at a point thereon in close proximity to said plant, consisting of great numbers of persons, some of whom were standing along said street and some of whom were walking in a close and compact circle across the entire traveled portion of said street, and said pickets by force of numbers, threats of bodily harm to plaintiff and damage to his property, and by force and violence consisting of taking hold of the automobile in which plaintiff was riding and thereby stopping it, and consisting of some of said pickets standing or walking in front of said automobile, blocked said public street and made passage to said plant over the same impossible for plaintiff and for others similarly situated, and defendants thereby wilfully and maliciously prevented plaintiff from going to and from said plant and from engaging in his said employment, and caused plaintiff to lose much time from his work, to-wit, from July 18, 1951 to August 22, 1951, and to lose earnings from his employment at said plant which he would have received had he not been prevented as aforesaid from going to and from said plant, and caused plaintiff to suffer much mental anguish, all to

plaintiff's damage as aforesaid, and plaintiff in additio to his claim for compensatory damages, claims of the d fendants such punitive and exemplary damages as are com mensurate with their malicious and reprehensible conduc as aforesaid and as may seem appropriate to the jury try ing this cause to punish defendants for such wrongful con duct and to deter defendants and others from committin similar wrongs in the future.

Count Two. Plaintiff claims of the defendants Fift Thousand ($50,000.00) Dollars as damages for that here tofore on, to-wit, the 18th day of July, 1951, plaintiff wa employed by Calumet and Hecla Consolidated Copper Com pany (Wolverine Tube Division) at its plant in Decatu Alabama. The only means of ingress and egress to an from said plant at said time was an entrance from a publi stret in Decatur, Alabama, known as Railroad Avenue i said City. On, to-wit, the date aforesaid, the defendant unlawfully conspired, confederated, and agreed together and with other persons who are not made parties to thi suit, to prevent the plaintiff and other employees at sai plant from entering the same and performing their dutie as such employees, and in furtherance of said conspiracy the defendant, International Union, United Automobile Aircraft and Agricultural Implement Workers of America C.I.O., an unincorporated organization, stationed or caused the individual defendants in this case and sundry othe persons to be stationed at, around and near the entrance to said plant on Railroad Avenue, the individual defendant and said other persons being hereinafter referred to a pickets, and some of said pickets were standing along sai street and some of them were walking in a close and com pact circle across the entire traveled portion of said street and by force of numbers and threats of bodily harm t

plaintiff and damage to his property, and by force and violence consisting of some of said pickets taking hold of the automobile in which plaintiff was riding and thereby stopping it, and by some of said pickets standing or walking in front of said automobile, the defendants blocked said Railroad Avenue and the entrance to said plant from Railroad Avenue, and thereby wrongfully and maliciously prevented the plaintiff from entering his place of employment at said plant for a long period of time, to-wit, one month, and as a proximate consequence plaintiff lost time from his work and lost earnings from his employment at said plant which he would have received had he not been prevented as aforesaid from entering said plant, and plaintiff claims punitive and exemplary damages to punish defendants for their wrongful conduct and to set an example to deter similar conduct in the future.

Horace C. Wilkinson
Julian Harris
Norman Harris

Part B

AMENDMENT TO COMPLAINT

Filed June 4, 1953

(R. 51)

Comes plaintiff and amends his complaint as last amended as follows:

Plaintiff amends Count One of his complaint by striking the words and figures "August 22" where they first occur therein and by inserting in lieu thereof the word and figures "September 24."

Plaintiff further amends Count One by inserting words "at various and sundry intervals during period" immediately following the words "and some whom were walking".

Plaintiff further amends Count One by inserting words "on or about July 18, 1951" immediately follow the words "and said pickets" and immediately before words "by force of numbers".

Plaintiff amends Count Two by inserting the words "plaintiff suffered much mental pain and anguish and humiliated and embarrassed" immediately preceding words "and plaintiff claims punitive and exemplary damages."

Horace C. Wilkinson,
Julian Harris,
Norman W. Harris,
Attorneys for Plaint

Part C

PLEA TO THE JURISDICTION

Filed August 15, 1952; Refiled December 15, 1952, May 25, 1953, June 4, 1953 and June 10, 1953

(R. 9)

PLEA TO THE JURISDICTION

Come now the defendants, International Union, Unit Automobile, Aircraft and Agricultural Implement Wo ers of America, C.I.O., an unincorporated organizatio United Textile Workers of America, A.F.L., an unincor rated organization; Local 88, United Textile Workers America, A.F.L., an unincorporated organization; Mich Volk; Tommy Wilson; Howard Hovis; Felton Dyer a Ralph Webster, named defendants in the above-styl

action, and they each individually and collectively file this their plea to the jurisdiction in said cause and to each and every count thereof separately and severally, and for grounds thereof show the following, separately and severally:

I

The Calumet and Hecla Consolidated Copper Company (Wolverine Tube Division) named as employer in said cause, at the times referred to in said complaint was an industry which affected interstate commerce within the meaning of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U. S. C. A. Sec. 141, et seq.).

II

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O. (U.A.W.-C.I.O.), at all times referred to in said complaint was a labor organization within the meaning of said Act and was the collective bargaining agent for certain employees of said employer.

III

During the entire period of time referred to in said complaint said employees represented by U.A.W.-C.I.O. were engaged in a strike and maintained a picket line on Railroad Avenue at the entrance to said employer's premises for the purpose of their mutual aid and protection as was their right and privilege under the provisions of Section 7 of the aforementioned Act. The activity of said employees represented by U.A.W.-C.I.O. and of alleged supporters of said employees in maintaining said picket line, is made the sole and entire foundation of plaintiff's complaint for damages.

IV

This Court is without jurisdiction over the subject ma ter of said complaint.

V

The Congress of the United States in the exercise of i power over interstate commerce by the provisions of sa Act has preempted and exclusively occupied the field regulation of labor relations in industries affecting inte state commerce, to the contravention and prohibition the exercise of any jurisdiction in said field by this Cour

VI

The Congress of the United States, in the exercise of it power over interstate commerce, by the provisions said Act has provided for the complete administration an enforcement of the rights and duties created and define by said Act and has created an exclusive forum, the Na tional Labor Relations Board, for the administration an enforcement of said rights and duties; and the Congres has defined therein all other rights of action for the viola tion protection and regulation of the rights and dutie created, defined and regulated by said Act, not within th exclusive jurisdiction of said forum, setting forth therei and defining said rights of action, setting forth the partie who have the right to enforce said rights of action and set ting forth the courts in which said rights of action may b adjudicated in the case of each such right of action so de fined and set forth.

VII

The subject matter alleged in the instant case, if true is regulated by Section 8(b)(1) of said Act, the jurisdic

tion for the regulation and enforcement of which is granted exclusively to the National Labor Relations Board, together with authority to take such remedial action and grant such relief as said Board shall deem appropriate for the violation of said Section, to the exclusion of the exercise of any jurisdiction whatsoever over the subject matter of said complaint by this Court.

VIII

This Court is without jurisdiction to grant the relief prayed for in said complaint.

IX

For this Court to entertain said complaint and to grant the relief therein prayed for, would be in violation of Article 1, Section 8, paragraph 3 of the Constitution of the United States, for the reason that said Constitutional provision grants to the Congress of the United States exclusive jurisdiction to regulate commerce between the several states, and Congress having undertaken to regulate said commerce by the aforementioned Act, any action by this Court upon the subject matter therein regulated would be in derogation of the authority granted to, and exercised by, Congress under said Constitutional provision.

Wherefore, the above-named defendants show that this Honorable Court has no jurisdiction of the subject matter, and of the cause of action, made the basis of said complaint and that this Court ought not to take further jurisdiction of said cause and complaint; and they pray that said cause be forever abated and dismissed.

Respectfully submitted,

Adair & Goldthwaite,
203 Connally Building Atlanta 3, Ga.
Sherman Powell,
Decatur, Ala.

AFFIDAVIT

State of Georgia
Fulton County

Personally before me, an officer authorized to administer oaths in and for said State and County, appeared M. E. Duncan who after first being duly sworn, deposes and says that he is Assistant Regional Director of Region 8 of the United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O. (U.A.W.-C.I.O.) and is an agent and representative thereof, which organization is a defendant in the above-styled cause; and he further says on oath that the facts alleged in the above and foregoing plea are known to him to be true and correct.

M. E. Duncan

Sworn to and subscribed before me this 8th day of August, 1952.

Mrs. S. A. Cleves, Jr.,
Notary Public, Fulton County, Georgia.

Part D

DEMURRER TO PLEA

Filed December 15, 1952; Refiled May 25, 1953 June 4, 1953 and June 10, 1953

(R. 45)

Comes the plaintiff in the above styled cause and demurs to the plea designated as "Plea To The Jurisdiction" filed by the defendants, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., an unincorporated organization, Michael Volk, Howard Hovis, Felton Dyer and Ralph Webster, separately and severally, and assigns the following grounds of demurrer, separately and severally, that is to say:

1. The plea does not set forth any facts which deprive the Court of jurisdiction to entertain and adjudicate the cause of action set forth in the complaint.

2. Neither at the time of the occurrence of the acts of the defendants made the basis of the complaint in this cause, nor at the time of the filing of this suit, did the National Labor Relations Board have any jurisdiction at the instance of the plaintiff or anyone in his behalf to award plaintiff relief on account of the wrongful acts of the defendants alleged in the complaint, or to redress the wrongful conduct committed by the defendants.

3. Neither the National Labor Relations Act nor the Labor Management Relations Act of 1947 deprive the State of Alabama of jurisdiction through its courts to redress wrongs sustained by any person as the result of a labor dispute, nor to award a citizen damages sus-

tained by him by reason of the wrongful conduct of employees of an employer governed by said Acts.

4. The exercise of this Court of its jurisdiction to render judgment awarding damages to the plaintiff and against the defendants for the wrongful conduct averred in the complaint does not in any manner impair, dilute, qualify, or in any respect subtract from any of the rights guaranteed and protected by the National Labor Relations Act and the Labor Management Relations Act of 1947.

5. Neither the National Labor Relations Act nor the Labor Management Relations Act of 1947 conferred upon the defendants the right to commit the wrongs alleged in the complaint, nor deprive this Court of jurisdiction to redress said wrongs at the suit of the plaintiff.

6. Wrongful conduct such as mass picketing, threats, force and violence, as alleged in the complaint in this cause, constitute the basis for a common law tort action, and the National Labor Relations Act and the Labor Management Relations Act of 1947 do not deprive the State of Alabama of authority to exercise its police power through its courts to adjudge and award damages in favor of the plaintiff against the defendants for such wrongful conduct.

7. The wrongful conduct of the defendants alleged in the complaint, such as mass picketing, threats, force and violence, gave rise to two remedies, one before the National Labor Relations Board to prohibit the same, and one before the courts of the state in which said acts were committed to award damages at the suit of any person injured thereby, and the remedy before the National Labor Relations Board was in addition to the right on the part of the injured person to maintain suit in a state court of competent jurisdiction, and there is no inconsistency between said remedies.

8. The maintenance of this suit does not in any way interfere with and is not inconsistent with the exercise of jurisdiction by the National Labor Relations Board conferred upon it by the National Labor Relations Act as amended by the Labor Management Relations Act of 1947.

9. No jurisdiction has been conferred by law upon the National Labor Relations Board to award compensatory damages sustained by plaintiff on account of the matter and things alleged in the complaint.

10. It does not appear that the labor organization which is a defendant in this case, or any other defendants, is responsible for unlawful discrimination against an employee under such circumstances as would confer jurisdiction upon the National Labor Relations Board under the provisions of Section 10 (c) of the Labor Management Relations Act of 1947 to order his reinstatement with back pay.

Horace C. Wilkinson,
Norman W. Harris,
Attorneys for Plaintiff.

Part E
JUDGMENT OF TRIAL COURT
(R. 53-4)

May 25, 1953. Upon the orders of the Court that th pleadings be settled and the issues be formed, comes th parties by their attorneys into open court, and, in keepin with the ruling and judgment of the Supreme Court o Alabama on appeal in this cause, it is considered, ordere and adjudged that the nonsuit taken by plaintiff on De cember 29, 1952 be and the same is hereby set aside, re scinded and annulled, and that this cause be and the sam is hereby restored to the trial docket of this Court fo further proceedings. Thereupon, defendants, Internationa Union, United Automobile, Aircraft and Agricultural Im plement Workers of America, C.I.O., an unincorporate organization, Michael Volk, Howard Hovis, Felton Dye and Ralph Webster re-file their plea to the jurisdictio of the Court, originally filed August 15, 1952, and re-file December 15, 1952, and plaintiff re-files his demurrer t said plea, and upon consideration of the same it i ordered and adjudged that the plaintiff's demurrer to sai plea to the jurisdiction be and the same is hereby sus tained.

Thereupon, said defendants refile their demurrer to th complaint as amended, the said demurrer having bee originally filed August 15, 1952, and upon considerati of the same it is ordered and adjudged that said demurre to the complaint be and the same is hereby overrule Thereupon, the defendants plead the general issue i short by consent, with leave to give in evidence any ma ter that would be a defense if well-pleaded, with leave t plaintiff to reply in like manner.

June 4, 1953. This cause having come on for trial on June 3, 1953, and a jury, consisting of G. H. Grisham and eleven others, having been duly impaneled, and the parties having proceeded with the introduction of evidence, plaintiff asks leave to amend his complaint by amending Counts One and Two and by adding Count Three, and the defendants having objected to the filing of Count Three, and the Court having considered said objection, it is ordered and adjudged by the Court that the same be and is hereby overruled, to which action of the Court the defendants reserve an exception.

Thereupon, the defendants moved to strike Count Three of the complaint, and said motion being considered by the Court it is ordered and adjudged by the Court that the same be and is hereby overruled, to said action of the Court in overruling said motion the defendants reserve an exception. By agreement of the parties hereto Count Three of the Complaint is withdrawn, and the defendants to the complaint as last amended re-file their said plea to the jurisdiction of the Court, and the plaintiff re-files his demurrer thereto, and said demurrer being duly considered by the Court it is ordered and adjudged by the Court that the same be and is hereby sustained. Thereupon, the defendants re-file their demurrer to the complaint as amended, and the Court having considered said demurrer it is ordered and adjudged by the Court that the same be and is hereby overruled. Thereupon, the defendants plead the general issue in short by consent, with leave to give in evidence any matter that would be a defense if well-pleaded, with a like leave on the part of the plaintiff to reply in like manner.

June 10, 1953. Upon the conclusion of the evidence the plaintiff amends his complaint by striking therefrom as defendants Howard Hovis, Felton Dyer, and Ralph Web-

ster, and the defendants, International Union, United Automobile, Aircraft and Agricultural Implement Workers of Ameria, C.I.O., an unincorporated organization, and Michael Volk re-file their plea to the jurisdiction of the Court. Whereupon, plaintiff re-files his demurrer to said plea, and said demurrer being duly considered by the Court it is ordered and adjudged by the Court that the same be and is hereby sustained. Thereupon, the said defendants re-file their demurrer to the complaint as amended, and the same being duly considered by the Court it is ordered and adjudged that said demurrer be and the same is hereby overruled. Thereupon, the defendants plead the general issue in short by consent, with leave to give in evidence any matter that would be a defense if well-pleaded, with a like leave on the part of the plaintiff to reply in answer thereto.

June 11, 1953. The jury empaneled to try the issues in this cause having been duly sworn according to law, and having heard the evidence introduced and the charge of the Court do upon their oaths say and do return into open court in words and figures as follows:

> "We the Jury find for the Plaintiff and assess the damage at $10,000.00.
>
> G. H. Grisham
> Foreman."

It is therefore in accordance with the verdict of the jury considered, ordered and adjudged by the Court that the plaintiff have and recover of the defendants, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., an unincorporated organization, and Michael Vofk, the said sum of Ten Thousand ($10,000.00) Dollars, together with the costs of this cause, for the recovery of which let execution issue.

Part F

ASSIGNMENTS OF ERROR IN THE SUPREME COURT OF ALABAMA PERTINENT TO REVIEW BY THE SUPREME COURT OF THE UNITED STATES

(R. 653, 654, 662, 677)

IN THE SUPREME COURT OF ALABAMA

No.....

JUDCIAL CIRCUIT

Appealed from the Circuit Court of Morgan County, Alabama

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), and Michael Volk, Appellants, Defendants Below, v. Paul S. Russell, Appellee, Plaintiff Below.	No. 6149

Come now the Appellants, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), and Michael Volk, separately and severally, and assign as error, separately and severally, the rulings, orders, judgments and decrees, separately and severally, of the Supreme Court of Alabama and of the Circuit Court, as follows:

1.

The Supreme Court of Alabama erred in its opinio judgment and decision of March 13, 1953, in the case Paul S. Russell v. International Union, United Autom bile, Aircraft and Agricultural Implement Workers America (UAW-CIO), et al., 8th Division 697, the prev ous appeal by the plaintiff in the within cause, decidin that the trial court erred in overruling the plaintiff's d murrer to the defendant's plea to the jurisdiction of th State Court, and reversing the judgment of the lowe court and remanding the cause. (Opinion of the Cour page 16, 8th Div. 697).

2.

The Supreme Court of Alabama erred in its decisio of April 2, 1953 in the case of Paul S. Russell v. Inte national Union, United Automobile, Aircraft and Agr cultural Implement Workers of America (UAW-CIO), al., 8th Div. 697, the previous appeal of the plaintiff i the within cause, overruling and denying the defendant application for a rehearing (Record, 8th Div. 697), an erred in failing to grant said rehearing, in failing t vacate its opinion and judgment of March 13, 1953, an in failing to affirm the judgment and decision of the tri court.

* * * * *

4.

The Circuit Court erred in its judgment and decisio (R., pp. 53, 54) sustaining plaintiff's demurrer (R. p 45, 46, 47), refiled (R., pp. 53, 54) to defendants' plea t the jurisdiction (R., pp. 9, 10, 11), based upon the lack jurisdiction in the state court, refiled (R., pp. 53, 54), t plaintiff's complaint and each count thereof, separatel

and severally, as amended (R., pp. 43, 44, 45), and refiled (R., p. 53, 54) to plaintiff's complaint and each count thereof separately and severally, as finally amended (R., pp. 51, 53, 54).

* * * * *

41.

The Circuit Court erred in giving to the jury at the request of the plaintiff, in writing, the following charge:

> "'9. The court charges the jury that picketing is lawful when it is for the purpose of observation, or for the purpose of peaceful persuasion, or for the purpose of apprising others of a dispute between employer and employees, but that picketing is unlawful if carried on with intimidation, threats, coercion, force or violence. Picketing is unlawful if such a large number of pickets is utilized as to obstruct a public street and block the entrance to a plant from said street, or if the pickets use threats or abusive language towards others to such an extent as to instill fear of harm or injury in the mind of a reasonable man. The Court further charges the jury that if the defendants in this case stationed or caused pickets to be stationed on a public street, as alleged in the complaint, for the purpose of preventing plaintiff and others from entering into their place of employment by means of intimidation, threats, coercion, force or violence, and if you are reasonably satisfied from the evidence that the number of pickets and their conduct as alleged in the complaint was such as to prevent the plaintiff by such unlawful means from entering his place of employment, and as a proximate consequence thereof the plaintiff was denied access to his place of employment for a long period of time, you should return a verdict in favor of plaintiff.' Given, S. A. Lynne, Judge." (R. 634.)

* * * * *

77.

The Circuit Court erred in its judgment (R. p. 79) overruling Ground 2 of defendants' motion for a new trial (R., p. 55), which is as follows:

> "For that the verdict of the jury is not sustained by any evidence in the case, and is without evidence to support it."

78.

The Circuit Court erred in its judgment (R., p. 79) overruling Ground 4 of defendants' motion for a new trial (R., p. 55), which is as follows:

> "For that the verdict of the jury is contrary to the great weight of the evidence."

* * * * *

Part G

MOTION FOR REHEARING—Filed April 5, 1956

(R. 709)

DENIED WITHOUT OPINION—June 21, 1956

(R. 716)

IN THE SUPREME COURT OF ALABAMA

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), and Michael Volk, Appellants, v. Paul S. Russell, Appellee.	8th Division 751

MOTION FOR REHEARING

Come now International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) and Michael Volk, Appellants in the above styled cause, and move that the Supreme Court of Alabama grant a rehearing in the above styled cause and that the judgment and opinion rendered and entered on the 22nd day of March, 1956 be reversed, revised and vacated, and move that upon said rehearing the Court enter its judgment reversing the final judgment of the Circuit Court of Morgan County entered in said cause.

Appellants further move and pray that the Court recall its certificate of affirmance from the Circuit Court of Morgan County pending consideration and disposition of

the within application for rehearing, and appellants further pray that the within application for rehearing be set down for oral argument before the Court.

As grounds for this motion and application for rehearing appellants show the following:

1.

In reaching its decision and opinion that the Circuit Court of Morgan County had jurisdiction to entertain the cause of action alleged by plaintiff, this Court erred in relying upon the case of *United Construction Workers v. Laburnum Construction Corporation,* 194 Va. 872, 75 S. E. 2d 694, and in ruling that the decision of the United States Supreme Court in the same case (347 U. S. 656), was applicable and controlling; and in reaching said determination as to jurisdiction the Supreme Court further erred in failing to consider and hold controlling the decisions hereinafter listed, which distinguish said *Laburnum* case, and which are controlling authority to the effect that the State Court is without jurisdiction in the within cause:

Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (March 1955);

Born v. Laube, (C. C. A. 9) 213 Fed. 2d 407; Same case on Rehearing, 214 Fed. 2d 349 (Cert. Den. U. S. Supreme Court 1954, 348 U. S. 855);

McNish v. American Brass Co., 139 Conn. 44, 89 Atl. 2d 566;

Mahoney v. Sailors Union of the Pacific, (Washington Supreme Court) 275 Pac. 2d 440;

Sterling v. Local 438 Liberty Association of Steam and Power Pipe Fitters and Helpers Association, Maryland Court of Appeals, 113 Atl. 2d 389;

Gonzales v. International Association of Machinists, (California District Court of Appeals, Feb. 16, 1956), 37 L. R. R. M. 2719;
Plankington Packing Co. v. Wisconsin Board, 338 U. S. 953;
United Automobile Workers v. O'Brien, 339 U. S. 454;
Garner v. Teamsters Union, 346 U. S. 485;
Amalgamated Association of Street, etc. Employees v. Wisconsin Board, 340 U. S. 383;
In Re Cory Corporation, 84 N. L. R. B. 972;
In Re Sunset Line and Twine Co., 79 N. L. R. B. 1487.

2.

In ruling upon Appellants' assignment of error that the verdict was contrary to the great preponderance or the great weight of the evidence (Joint Assignment 78), the Court failed to follow the established rule in Alabama that upon motion for new trial it is the duty of the trial court to set aside a verdict which is contrary to the great preponderance of the evidence, and that on appeal from a judgment of the trial court on a motion for a new trial it is the province of the Supreme Court to set aside a verdict which is contrary to the great preponderance of the evidence, in that there is not sufficient evidence in the record to authorize a finding that work would have been available for the plaintiff at the premises of his employer even if the alleged improper picketing had not existed.

Barber v. Stephenson, 260 Ala. 151, 69 So. 2d 251.

3.

The Court erred in holding that the trial court did not abuse its discretion in admitting evidence of events transpiring on August 20 and August 22, 1951, separately and

severally, and in holding that such evidence was admissible for the purpose of proving the allegations of Count 2 alleging a conspiracy on the authority of *Barber v. Stephenson*, 260 Ala. 151, 69 So. 2d 251. In particular the items of evidence which were improperly admitted are separately and severally the following:

(1) Photographs of the picket line on August 22, 1951;

(2) A moving picture of the picket line on August 22, 1951;

(3) Testimony concerning a locomotive incident on August 20, 1951.

Further, the Court should have considered and followed the following authorities which hold that the trial court must exercise a sound discretion in admitting evidence which will arouse the sympathies or prejudices of the jury rather than throw any real light upon the issue, which exercise of discretion is subject to review and reversal when abused.

City of Anniston v. Simmons, 31 Ala. App. 536, 20 So. 2d 52 (Cert. Den. 246 Ala. 153, 20 So. 2d 54);

Birmingham Baptist Hospital v. Blackwell, 221 Ala. 225; 128 So. 389;

22 Corpus Juris, §1115, p. 914.

4.

In holding that no reversible error was shown in connection with plaintiff's unnumbered explanatory charge (Joint Assignment of Error 42), the Court failed to consider the change of law as to procedure resulting from Acts 1943, p. 423 (Title 7, §827 (1) through §827 (6) of the Alabama Code), and improperly found that the sub-

ject-matter covered by said charge was fully and correctly covered in the Court's oral charge.

5.

In considering plaintiff's requested Charge #9 (Joint Assignment of Error 41), and in holding that no reversible error was shown in connection with said Charge, the Court erred in holding that the Charge was susceptible of two constructions and failed to consider Appellants' contention that said charge omitted to include an essential element of plaintiff's cause of action, and, therefore, authorized the jury to return a verdict for the plaintiff without a preliminary finding that such essential element was shown by the preponderance of the evidence.

6.

In reaching its determination that the verdict in the within cause cannot be held to be excessive the Court failed to consider (1) the lack of proof that work would have been available for the plaintiff if he had reported for work; (2) the fact that the plaintiff's employer told representatives of the appellant union that it would not need hourly employees to work during the strike; (3) the fact that a representative of the plaintiff's employer came to the picket line on July 18, before the plaintiff came to the picket line, and instructed representatives of the appellants how supervisory employees whom it desired to enter the plant could be identified; (4) the fact that there was no rebuttal in the record to the evidence contained in testimony of several witnesses and in interrogatory answers that the plaintiff's employer did not intend to operate the plant during the strike; (5) the fact that the plaintiff's employer made no effort and showed no desire to operate the plant until after the plaintiff, and others, procured a

sufficient number of signatures (250) to a petition requesting that the plant be reopened; (6) the fact that under these circumstances there was no showing that the appellants had any reason to believe that the plaintiff would be caused to lose employment; (7) the fact that under these circumstances there could be no malicious or wilful intent to disregard the plaintiff's right as to working, or (8) the fact that under these circumstances the damages awarded are entirely disproportionate to any damage the plaintiff may have suffered if he could have worked and to any possible wrong which the appellants may be responsible for.

Wherefore, appellants pray that this application and motion for rehearing be filed and considered; that pending such consideration the certificate of affirmance be recalled from the Circuit Court of Morgan County; that this application and motion be set down for oral argument; that upon reconsideration and rehearing this Court vacate and reverse its opinion and judgment of March 22, 1956, and enter its opinion and judgment reversing the judgment of the Circuit Court of Morgan County.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellants respectfully pray that they be granted the privilege of oral argument upon the foregoing motion and application for rehearing.

J. R. Goldthwaite, Jr.,
Attorney for Appellants.

CERTIFICATE OF SERVICE

This will certify that I have this day served copy of the above and foregoing motion and application for rehearing, and copy of the brief in support of said motion upon Norman W. Harris, Attorney for Paul S. Russell, by mailing same, postage prepaid, to his office in the State National Bank Building, Decatur, Alabama.

This the 4 day of April, 1956.

J. R. Goldthwaite, Jr.,
Attorney for Appellants.